IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN ROMIG AND DANIEL W. HARDING,
APPELLANTS,
v.
MYRTLE GILLETT,
APPELLEE.

No. 263.

BRIEF AND ARGUMENT OF COUNSEL FOR APPELLEE.

STATEMENT OF FACTS.

In the "Brief on behalf of appellants in resistance of motions to quash supersedeas and to dismiss appeal," filed in this case during the October Term of this court, 1900, there is, on pages 2, 3, 4, 5, and 6, a statement of the facts in this case. This statement by appellants presents the facts in a manner most favorable to support their contentions. It is not accepted as correct by the appellee. In the Opinion of the Supreme Court of Oklahoma (Printed Record, page 54), will be found a state-

ment which is impartial and which is sufficiently comprehensive to advise this court of the points at issue.

Hence, appellee will not reproduce a statement of the facts in this brief.

BRIEF.

1. It seems to be conceded by the appellants that a publication made upon an affidavit, sworn to upon information and belief, is wholly defective, but if it is not admitted, it is well settled by the following authorities:

Sylph Mining and Milling Co. *v.* Williams, 36 Pac. 80.

Thompson *v.* Higginbotham, 18th Kan. 44.

Thompson *v.* Higginbotham, 14th Kan. 224.

City of Atchinson *v.* Bartholow, 4th Kan. 124.

No attempt was made to amend the affidavit by swearing to it positively, for they could not in truth do so, as Myrtle Gillett had resided within 20 miles of the sitting of the court, and such an affidavit can only be amended so as to speak the facts as they existed at the time of making the original affidavit.

Long *v.* Fife, 25 Pac. 594.

Frybarger *v.* McMillen, 25 Pac. 713.

2. All the steps necessary to give the court jurisdiction must be taken to sustain service by publication.

Strode *v.* Strode, 52 Pac. 161.

3. If affidavit for publication set up a cause of action different from that set up in the petition, the defect is fatal.

Vermont Loan and Trust Co. *v.* McGregor, 51 Pac. 104.

4. The description of the land in the petition and affidavit herein are not the same. The description in the affidavit included the lands described in the petition and other lands.

5. Counsel claim that although the affidavit is not sufficient upon the question of non-residence, yet the following statement in the affidavit for publication is sufficient to give the court jurisdiction, viz: "Affiant further says that he is unable and that plaintiff is unable by using due diligence to obtain service of summons on the defendants within the Territory of Oklahoma." Affiant further states that on the —— day of March, 1896, he caused a summons to be issued in said cause for said defendants directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, "Defendants not found in my county."

The statute reads as follows (Sec. 3951):

"Before service can be made by publication an affidavit must be filed, stating that the plaintiff with due diligence is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section.

6. The judgment sought to be set aside in this action is found on pages 32, 33 and 34 of the original, and pages 18, 19 and 20 of the printed record.

The affidavit of publication upon which the original judgment in this case was based, was found on pages 27 and 28 of the original, and pages 15 and 16 of the printed record.

The motion to set aside the judgment is found on pages 51 and 52 of the original, and pages 29 and 30 of the printed record. And the affidavit of Myrtle Gillett in

support of the motion is found on page 54 of the original, and 31 of the printed record.

7. So far as appellee, Myrtle Gillett, is concerned, this is a proceeding to exclude her from any interest in the real estate sought to be sold under the mortgage. The allegation in the petition in relation to her is as follows:

"Plaintiff further states that the defendant, Myrtle Gillett, has or claims to have some interest or lien on said premises or part thereof, and if any she may have, it is junior, inferior, and subject to the plaintiff's mortgage deed."

In the affidavit for publication it is stated:

"That said defendant claims a lien upon, or right, title, estate, interest, claim or equity of redemption in or to said premises or some part thereof, and inferior to the rights of said plaintiff, and praying judgment for the amount due said plaintiff on the said indebtedness for the foreclosure of said mortgage. That the lien, claim, interest, estate, and equity of redemption of the said defendants in and to the said premises, if any they have, be determined and settled, and that said plaintiff be adjudged to have the first lien and claim upon said premises."

The journal entry in said cause recites:

"That the deed from Don A. Gillett to Myrtle Gillett was made and executed subsequent to the plaintiff's mortgage, * * * and it is further ordered and adjudged by the court that in case the said defendants or any one of them fails from and after the rendition of this judgment to pay the said plaintiff * * * an order of sale issue to the sheriff of said county and Territory, commanding him to advertise and sell according to law the lands and tenements in said petition described, * * * and it is further ordered and adjudged by this court from and after the sale of this land and tenements under and

by virtue of this judgment and decree, that the said defendants, Don A. Gillett and Myrtle Gillett, and all persons claiming under them since the commencement of this action be and are hereby forever barred, foreclosed of and from all liens upon the right, title, interest, estate, or equity of redemption of, in, or to said lands and tenements or any part thereof."

Now, Section 3950, referred to above by Section 3951, provides:

"Service may be made by publication in either of the following cases: * * * in actions which relate to, or the subject of which is real or personal property in this Territory, where any defendant had or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the Territory or a foreign corporation."

8. It is not only necessary by Section 3951 that the affidavit show that service cannot be made within this Territory with due diligence, but it must also show that it is one of the cases mentioned in Section 3950, which it wholly failed to do by reason of the fact that the affidavit as to non-residence is fatally defective. In this case, in order to come within the purview of Section 3951, the affidavit must not only allege that service cannot be made upon the defendant with due diligence within this Territory, but also that she was a non-resident of the Territory, as that would be the only way in which it would show that the case was one of those mentioned in Section 3950.

9. But is the affidavit sufficient, independent of the fact that it fails to allege that the appellee, Myrtle Gillett, was a non-resident? That is, concede for the sake of argument that it was not necessary for the affi-

davit to state that she was a non-resident, and that if it showed that service could not be made upon her by the use of due diligence, that then the court would have had jurisdiction, is the affidavit then sufficient? We think not. In Kohn *v.* Matthai, 115 California, 47, p. 698, it is held that:

"An affidavit for publication stating that the plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them, with the information that they could not find the defendant and that she could not be found in the city or county, is insufficient, without showing what diligence was used to procure service on her."

In Victor Mill Co. *v.* Justice, &c., 1st P. (Nev.) 831, it was held:

"Where a summons to a foreign corporation is returned not served, and the affidavit states that plaintiff could not, after due diligence find defendant within the State, neither of these things tend to prove that there was no officer of defendant in the State on whom personal service could be had."

In Palmer *v.* McMaster, 33 P. (Mont.) 132, it was held:

"Since the statute requires an affidavit on which an order of publication is made to state that defendant cannot be found after due diligence, it is insufficient to allege merely that the defendant has departed from the Territory and cannot be found therein, without stating that diligence has been made to obtain personal service."

In Alderson *v.* Marshall, 16 P. (Mont.) 576, it was held:

"Under session laws of Montana, 1883, providing for service by publication when the defendant, after due

diligence, cannot be found, and an affidavit stating these facts is filed with the clerk, a publication based on an affidavit alleging due diligence but not stating the facts showing the diligence is void."

10. In contrast to these we will quote a decision where the affidavit was held good. In Ligare *v.* Cal. S. R. Co., 18 P. (Cal.) 854, it was held:

"Under code civil procedure (Cal. Sec. 412), providing for an order of publication, if the defendant cannot, after due diligence, be found within the State, an affidavit to obtain such an order, which states that defendants have been sought for to obtain service or summons thereon, but after diligent search and inquiry cannot be found within the State, and that affiant has made inquiry of all persons from whom he could expect to obtain information as to the residence of defendants; that summons and alias summons had been placed in the hands of the sheriff of the county where the suit was instituted, and of the sheriffs of several other counties, and that all such writs were returned unserved after diligent search for defendants, is sufficient to show due diligence when attacked collaterally."

11. These cases hold that an affidavit must allege facts which show that due diligence had been used and that the defendant could not be found. Oklahoma also holds that the affidavit "should set out definitely what diligence had been used to serve summons upon defendant," Raymond *v.* Nix, 49 Pac. 1113.

12. But it may be claimed by counsel for appellants that the statement "That plaintiff is unable, by using due diligence, to obtain service of summons on the defendants within the Territory of Oklahoma," is an allegation of an ultimate fact and is sufficient under the statute. We think that the affidavit ought to set out the

facts showing the diligence; yet conceding that it might generally be true that it is an allegation of ultimate fact and could be so alleged, yet in this case we do not think that the allegation in the affidavit in this case is sufficient for this reason: that the affidavit does not stop with that allegation, but goes on to state what diligence was used, as follows: "Affiant further states that on the 4 day of March, 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, defendants not found in my county." Having stated the diligence he is presumed to have stated all the diligence used, and that the affiant understood when he swore that he could not make service by the use of due diligence, that the diligence stated constituted due diligence, and upon a proceeding for perjury could defeat the action by stating that he thought the facts stated in the affidavit constituted due diligence, and that he set up in the affidavit what had been done. Affidavit should at least state that plaintiff had used due diligence; as it stands now, it is only an expression, under oath, that service could not be made by the exercise of due diligence.

13. There is another phase of this affidavit which we think is absolutely fatal to it even upon the theory of the appellant, Mr. Harding, and that is that there is nowhere a statement in the affidavit that the appellant and his attorney did not at all times know that the appellee, Myrtle Gillett, resided in Kingfisher county, within 20 miles of the sitting of the court, at the time of the issuance of the summons, the filing of the affidavit, and the entry of judgment, &c.

14. The affidavit does say that "Affiant further says that he is unable and that the plaintiff is unable by using due diligence to obtain service of summons on the defendants

within the Territory of Oklahoma." The affiant says the defendants, *i. e.*, both of them. It might have been true that they could not get service of summons upon the defendant, Don Gillett, and they might have known this, and then they could have truthfully made the affidavit filed in this case, although they may have known that Myrtle Gillett resided upon her farm in Kingfisher county.

15. If the affidavit should have said the service of summons could not be made upon defendant Don Gillett or Myrtle Gillett, or if it had said that service could not be made upon the defendants or either of them, it would have stated that Myrtle Gillett could not be served, but to say that the defendants could not be served is simply an allegation that all could not be served, and is not an allegation that none could not be served. If such an affidavit could be upheld it would certainly open the door for the practice of great fraud. A plaintiff could, by joining one non-resident with several resident defendants, make an affidavit that the defendants could not be served in the Territory, and proceed to get service of summons by publication, and by not calling the attention of the resident defendants to the overdue interest, or otherwise calling their attention to the default, lull them into forgetfulness of their obligation or into carelessness in regard to it, and get judgment of foreclosure and sell the property without their knowledge, as was done in this case.

16. In constructive service where a man's property is taken away from him without any actual notice to him, every provision of the statute should be construed strictly in order to give the court jurisdiction.

This case illustrates how easily a great wrong might be done a resident defendant, if affidavit of the character of the one in this case be upheld.

Every resident of this Territory is entitled to be served

personally, unless it be shown that it cannot be done with reasonable diligence, and that the case is one mentioned in section 950.

17. If sheriff's return of service falsely shows that it was made by delivery, to the defendant himself, of a copy, the defendant cannot contradict the return, but he has a right of action against the sheriff for a false return. If the return shows that service was made by leaving a copy at the usual place of residence, the defendant can come in after judgment and have the judgment set aside as void for the reason that it was not, as a matter of fact, left at his usual place of residence.

Hanson *v.* Walcott, 19th Kansas, 207, and cases cited.

In the case *supra*, the sheriff's return showed that he had left the summons at the usual place of residence. The defendant came and showed that the place at which the sheriff had left the summons was not his place of residence. The court said:

"It is conclusively shown in this action within the decision of Bond *v.* Wilson, 8th Kan. 228, that the judgment of the court below was rendered against the plaintiff in error, without any service of summons upon him, and that the judgment is void, as the court had no jurisdiction of the person of the said Hans Hanson."

18. If the defendant has a right of action against the sheriff for a false return, in case he is not actually served, and the sheriff makes such return, and can have the judgment set aside as void, in case the return shows that the summons was left at the usual place of residence of the defendant, and it was not; then it certainly seems to us that in case of service by publication, even if the affidavit was positive that service could not be made upon the de-

fendant with diligence (setting up the facts showing such diligence), and that the defendant was a non-resident of the Territory, when in truth and in fact he was a resident of the Territory, and that his residence could easily have been ascertained and service made upon him, that he ought to be permitted to show these facts, and the judgment set aside as void. This is the doctrine in Oklahoma, see:

Hockaday *et al. v.* Jones, 56 Pacific (Okla.), page 1054.

In this case it is held that if a person resides within the Territory, he must be personally served. The court, in this case, overlooks Section 4471, which authorizes the action of the court in that case, and decided that independent of that section and under the inherent power of the court, the court would set aside a void judgment.

If not, what protection has he? He cannot sue the sheriff for a false return; the plaintiff or the person who made the affidavit may be insolvent, and though his property may be taken and sold without his knowledge he will be without remedy. It might be claimed that he might proceed against the party who made the affidavit for perjury. That would be a very poor satisfaction in any event and a very doubtful proceeding under all circumstances. But, in the present case, even that source of satisfaction would be cut off. Upon an indictment for perjury, the defendant would answer: "I only swore that I believed the defendants were non-residents and I did believe it; and I only swore that service of summons could not with due diligence be made upon the defendants in this Territory, and that was true, for at that time the defendant, Don Gillett, was a non-resident and absent from the Territory, and further that it was his real opin-

ion that service could not be made by the use of diligence." It does not seem to us that the appellants have a leg to stand on in any way this case may be reviewed.

19. The record shows that the sale of this land took place February 23, 1897; that it was confirmed March 1, 1897; that thereafter the sheriff made a deed to plaintiff; that on March 9, 1897, plaintiff sold it to Harding. The testimony shows that Myrtle Gillett did not know anything about the suit or proceedings "until long after the sale of said land." (See Myrtle Gillett's affidavit.) So it appears that she did not know anything about the matter until after the sale of land to Harding. But if she had known all about it all the time it would have made no difference, as it would have been incompetent to show it.

Roberts *v.* Roberts, 31 P. 941. Freeman on Judg., Sec. 117.

20. The counsel for appellants do not at all comprehend the scope of appellee's motion if they believe as stated in their brief that it was filed under Section 3955 of Statutes 1893. That section authorizes a defendant who has been PROPERLY served by publication to come in at any time within three years and be let in to defend upon a showing that he had no actual notice of the suit and that he has a defense to the action; but this section has no application to the case at bar, in which it is alleged that the judgment is void: 1st, For want of proper service; and, 2d, That the action was not brought in the county in which the defendant resided.

21. Neither does Section 4468 have any bearing upon the case at bar; that Section has reference to proceeding under Section 4464 where the parties were PROPERLY in court, but where by reason of the facts stated in Section 4464 judgment was erroneously or wrongfully entered.

For the information of the counsel we will say that the motion was filed under Section 4471, which provides * * * "A void judgment may be vacated at any time on motion of a party or any person affected thereby," and under the power inherent in all courts of general jurisdiction to vacate and set aside a void judgment upon their attention being called to it.

22. "A void judgment may be vacated and set aside at any time on motion of the defendant, without advising the court that the defendant has a valid defense to the action in which the pretended judgment is rendered."

Hanson *v.* Walcott, 19 Kans. 207.
Bond *v.* Wilson, 8 Kans. 228.
Gapen *v.* Stephenson, 17 Kans. 616.
Mastin *v.* Gray, 19 Kans. 468.
Kirkwood *v.* Reedy, 10 Kans. 455.
Green *v.* McMurtry, 20 Kans. 193.
Peerce *v.* Butler, 21 Kans. 124.
McNeill *v.* Edie, 24 Kans. 110.
Bank *v.* Sewing Society, 28 Kans. 424.
Tracy *v.* Green, 29 Kans. 510.
Reynolds *v.* Fleming, 30 Kans. 106.
Williams *v.* Moorehead, 33 Kans. 618.

23. When a judgment is sought to be set aside for the reason of some defect in the affidavit of publication the constant practice in Kansas is to do so by motion filed in the original case as Myrtle Gillett has done in this case.

Harrison *v.* Beard, 30 Kans. 532.
Hanson *v.* Walcott, 19 Kans. 207.
Washburn *v.* Buchanan, 34 P. Kans. 1049.
Grouch *v.* Martin, 27 P. Kans. 985.
Land *v.* Fife, 25 P. Kans. 594.

24. Under the Kansas practice such a judgment as this can be impeached and set aside, even in an action in eject-

ment upon proof *aliunde* to show that the court did not have jurisdiction.

Mastin *v.* Gray, 19 Kans. 458.
McNeill *v.* Edie, 24 Kans. 110.
Kay *v.* Walters, 28 Kans. 115.
Perry *v.* St. Joseph W. R. Co. 29 Kans. 424.
Brinkman *v.* Shafer, 23 Kans. 531.

25. Counsel for appellants claim that the appellee is estopped by her laches. In Carey *v.* Reaves, 46 Kans. 571, judgment was set aside as void. Suit was brought 22 years after affidavit was filed, and finally decided and judgment set aside 30 years after.

26. Counsel, in their brief, say: "This is an action *in rem* and the *res* gives the court jurisdiction," and cites some authorities. Now, these authorities are not in point for these reasons: 1st. If the *res* did give jurisdiction it would be only upon proper affidavit and publication, which are lacking in this case; and, 2d, an examination of the statutes under which they arose will disclose the fact that the statute fixes the venue at the place where the *res* was; whereas our Organic Act fixes the venue of all civil actions in the county in which the defendants, or either of them, reside or may be summoned. See last half of 2d subdivision of Article 10 of the Organic Act. It reads: "And all civil actions shall be instituted in the county in which the defendants, or either of them, reside or may be found.

27. Counsel upon their claim that Myrtle Gillett is estopped from making this motion, cite in support of such contention—

Freeman on Execution, Sec. 307, and
Capital Bank *v.* Huntoon, 35th Kans., 577.

Neither is applicable. Sec. L, 307 of Freeman, relates to motion to set aside judicial sales "FOR IRREGULARITIES

IN THE SALE and not for want of jurisdiction to render the judgment." The case in the 35th Kansas is also a case to set aside sale for IRREGULARITIES AND FRAUD PRACTICED AT THE SALE, and it was held that the motion was not made in time, but in the same opinion the court held that the sale was VOID as to some of the real estate, and as to those lots the action was in time, and uses the following language:

> "Under the great weight of authority we think it must be held that the sale of these eight lots is void, and that such sale must be held void in the present action, or in any action or proceeding." See subdivision 6 of said opinion.

28. In addition to these authorities, counsel cites Williams *v.* Ives, 49th Illinois, 512, and Runell *v.* Brown, 41st Illinois, 184, and Orwed *v.* Kempsman, 28th Fed. 36. We have not been able to examine these last authorities, but suppose they are equally as inapplicable, as counsel seem to be unable to grasp the idea that the judgment itself is void, as shown by the affidavit introduced upon the motion.

29. The doctrine of estoppel or limitation does not apply to a void judgment.

Statute Oklahoma 1893, Section 4471.

Freeman on Judg., Sec. 117, which reads as follows:

"A void judgment is in legal effect no judgment. By it no rights are vested From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are worthless. It neither bids nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale finds himself without title and without redress. The first and

most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislature or other department of the government, can invest it with any of the elements of power or of validity. This inquiry is to be prosecuted only by an investigation of jurisdictional facts upon whose real or assumed existence every valid judgment must stand."

30. A mortgage in Oklahoma is a mere security and does not convey or grant the title, even on condition (Stat. of Okla. 1893, Secs. 3255, 3258, 3259, 3260 and 3261). It will be noticed by Section 3257 that the title to the real estate which is subjected to the security for the payment of the debt is not attempted to be passed, but simply "mortgaged to the mortgagee" to secure the payment of his debt.

To emphasize the fact that the legislature never intended that the title should ever pass, Sec. 3259 provides: "Mortgages of real property may be acknowledged or proved, certified, and recorded in like manner and with like effect as GRANTS thereof."

It is a mere lien. (Secs. 3185, 3186, 3187, Stat. Oklahoma, 1893.)

Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property to the lien. (Sec. 3190, Statutes of 1893.)

All contracts for the forfeiture of property subject to lien in satisfaction of the obligation, and all contracts in restraint of the right of redemption from a lien are void. (Sec. 3191, Stat. 1893.)

31. The appellants have cited numerous authorities to the effect that a mortgagee in possession could not be

ousted even in ejectment until his debt was paid. But we desire to call the attention of the court to the fact that in all these cases they were common law mortgages in which the title to the real estate was passed to the mortgagee or statutory mortgages in which the common law mortgage was made the "statutory mortgage" and the title was passed to the mortgagee upon default of the mortgaged debt. But the court will observe a different doctrine by an examination of the following authorities, viz:

Jones on Mortgages, Sec. 717, 29 Mich., p. 44; 12 Mich., p. 270; 48 Tex. 270; 52 Iowa, pp. 215–217; 30 Mich., p. 380.

In this connection we desire to call the special attention of the court to the 7th Pac. 893, and to Jones on Mortgages, Sec. 1678, *et seq.*, and to the case of Payne *v.* Long-Bell Lumber Co. (Okla.).

32. By the records and findings of the court, it appears that Myrtle Gillett had no actual or legal notice of the pendency of the suit until after the sale of the land.

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